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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 09-50026 (REG)

6 | In the Matter of:

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MOTORS LIQUIDATION COMPANY, et al.

9 f/k/a General Motors Corporation, et al.,

10

11 | Debtors.

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15 | United States Ban

16 | One Bowling Green

17 | **New York, New York**

18

19 | May 17, 2011

20 9 : 48 AM

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23 | B E F O R E :

24 HON. ROBERT E. GERBER

25 U.S. BANKRUPTCY JUDGE

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2 HEARING re Status Conference - NCR Corporation v. General
3 Motors Corporation, et al., Adv. Proc. No. 11-09400 (REG)

4

5 HEARING Debtors' Objection to Administrative Claim No. 70792
6 Filed by John Mealer

7

8 HEARING re Motion of Post-Effective Date Debtors for Entry of
9 Order Pursuant to 11 U.S.C. § 365 Authorizing Debtors to Assume
10 and Assign Certain Dealer-Related Agreements to General Motors
11 LLC

12

13 HEARING re Debtors' 219th Omnibus Objection to Claims
14 (Contingent Co-Liability Claims)

15

16 HEARING re Debtors' 220th Omnibus Objection to Claims
17 (Contingent Co-Liability Claims)

18

19 HEARING re Debtors' Objection to Claim Nos. 67121 and 67122

20

21 HEARING re Debtors' Fifteenth Omnibus Objection to Claims
22 (Amended and Superseded Claims)

23

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25 Transcribed by: Lisa Bar-Leib

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1 P R O C E E D I N G S

2 THE COURT: Morning. Have seats, please. Okay.

3 We're here on GM, Motors Liquidation Corporation. Mr.

4 Smolinsky, good morning. How would you like to proceed?

5 MR. SMOLINSKY: Good morning, Your Honor. Joseph
6 Smolinsky of Weil Gotshal & Manges for the debtors and post-
7 reorganization debtors -- post-confirmation debtors, I should
8 say. We have a fairly short calendar today. I think the first
9 matter on the calendar is a status conference for the NCR
10 adversary proceeding. We're happy to start there. And my
11 colleague, Brianna Benfield, will address those matters.

12 THE COURT: Okay. Ms. Benfield?

13 MS. BENFIELD: Good morning, Your Honor. Brianna
14 Benfield from Weil Gotshal & Manges on behalf of the debtors
15 and post-confirmation debtors, Motors Liquidation Company. As
16 Your Honor is aware, the parties have already entered into a
17 scheduling order in the NCR adversary proceeding. The debtors
18 agreed to the terms of that scheduling order setting forth
19 various discovery deadlines in fulfillment of our obligations
20 under the federal rules --

21 THE COURT: Pause, please, Ms. Benfield. I need to
22 keep the air conditioning on to keep the courtroom comfortable.
23 But you're talking over a fan that's right behind you or at
24 least between you and me. Can you speak very loudly into the
25 microphone, please?

1 MS. BENFIELD: Yes. Is this better?

2 THE COURT: Much.

3 MS. BENFIELD: Okay.

4 THE COURT: You can angle that microphone. Maybe
5 that'll meet you halfway. Continue.

6 MS. BENFIELD: Okay. As I was saying, the debtors
7 entered into the scheduling order in fulfillment of their
8 obligations under the federal rules but the debtors also have
9 to fulfill their obligations as fiduciaries of the estate and
10 to conserve estate resources. And so, for that reason, we'd
11 like to discuss the appropriate scope of discovery in this
12 matter with you today.

13 It's the debtors' --

14 THE COURT: Well -- pause, please. You have an
15 adversary? I mean, where is your adversary on this?

16 MS. BENFIELD: I believe NCR's counsel is on the
17 phone, Mr. Hamermesh.

18 THE COURT: Mr. Hamermesh, are you on the phone?

19 MR. HAMERMESH (TELEPHONICALLY): Hello, Your Honor.
20 Yes.

21 THE COURT: Okay. Go ahead.

22 MS. BENFIELD: Okay.

23 THE COURT: Ms. Benfield, back to you, please.

24 MS. BENFIELD: It's the debtors' hope that the full
25 six months of discovery contemplated under the scheduling order

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1 won't be necessary in this case because the debtors think that
2 the relevant issues in this case are relatively narrow and
3 straightforward. So what I'd like to do this morning in this
4 pretrial conference is just briefly discuss the relevant issues
5 to the debtors, some of the issues relating to discovery, and
6 then we would welcome Your Honor's views as to the appropriate
7 scope of discovery in this matter.

8 So first, as to the relevant issues in this case,
9 this is really just a dispute about the priority of payment.
10 NCR Corporation claims that they're owed approximately 2.3
11 million dollars for past environmental remediation costs that
12 they paid relating to a site called the Valleycrest Landfill in
13 Dayton, Ohio. And NCR overpaid its fair share of those costs
14 and then, back in 2007, GM reached an agreement with NCR
15 whereby to compensate NCR for its past overpayment, GM would
16 pay NCR's fair share of the cleanup costs going forward.

17 The debtors don't dispute that GM made that agreement
18 or that promise to pay NCR's past overpayments. But the
19 debtors don't see this as anything more than a mere promise to
20 pay giving rise to a standard debtor/creditor relationship and
21 a general unsecured claim.

22 NCR's counsel -- or NCR in their complaint, however,
23 contends that this gives rise to a constructive trust or an
24 expressed trust in the amount of the overpayment. The debtors
25 view the trust issue really as a question of law and one about

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1 which extensive discovery isn't really necessary. As to the
2 constructive trust, the debtors view this as an issue of law
3 because there's significant case law in this circuit and in
4 others to the effect that constructive trusts are a disfavored
5 remedy in liquidating bankruptcy cases because the creation of
6 a constructive trust really wreaks havoc on the distribution
7 scheme and really ends up depriving other deserving creditors
8 of their share of the estate proceeds.

9 Additionally, there is a requisite element to
10 establish a constructive trust whereby it must be shown that
11 the purported trustee, the party obtaining the property, did so
12 with some sort of wrongful conduct or fraudulent conduct. And
13 that element isn't present here nor is it claimed to be present
14 here. The debtors simply failed to pay NCR's share of the
15 cleanup costs going forward because of the bankruptcy, that
16 that's certainly not fraudulent or wrongful conduct; it was
17 required under the Bankruptcy Code.

18 So the debtors think that, as a matter of law, they
19 would prevail on the constructive trust claim and there really
20 isn't any need for extensive discovery on that issue.

21 As for the express trust issue, an essential element
22 to establish an express trust, and also a constructive trust as
23 well, is that there must be the existence of a trust race.
24 Here, the debt -- and that trust race must have been conveyed
25 to the purported trustee.

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1 Here, the debtors, from our initial investigation,
2 don't think that that element is satisfied as a matter of law
3 either because the way this payment system worked, NCR had been
4 paying its cleanup costs to an outside consultant and then
5 later in 2007, the parties agreed that going forward, GM would
6 pay NCR's cleanup costs. But there was never any money or
7 property conveyed to GM for that purpose. GM just paid the
8 cleanup costs out of its general account.

9 Certainly, some discovery as to the existence of a
10 trust race would probably be helpful in this case. But the
11 debtors really think that that's the sole issue on which
12 discovery is needed in this case.

13 It's important for the debtors to really focus on the
14 key dispositive issues here because extensive discovery would
15 significantly burden the estate given that MLC, the debtors,
16 are in possession of approximately 3 to 4,000 boxes of
17 documents that were transferred to them from what's now New GM
18 relating to environmental liabilities. These are in a
19 warehouse out in Pontiac, Michigan. And to require the debtors
20 to search through all of these documents for anything that
21 might be related to this Valleycrest Landfill site, or NCR,
22 would really be an unnecessary burden given that the majority
23 of the case can be disposed of as a matter of law.

24 THE COURT: Pause, please, Ms. Benfield. If NCR were
25 asking for an unsecured claim instead of asserting claims of

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1 trust, constructive or express, would GM be still contesting
2 this claim?

3 MS. BENFIELD: No, not really, Your Honor. I
4 think -- in conversations with counsel, we've essentially
5 indicated to them that we would be open to allowing this as a
6 general unsecured claim. We think that we're very close on the
7 numbers. We may be essentially in complete agreement on the
8 numbers. We would, of course, now have to consult with the GUC
9 trust, the general unsecured claims trust, as to whether or not
10 we could allow this claim. But that's essentially been our
11 position in the past. We don't contend that this is a debt
12 that the debtors owed.

13 THE COURT: You don't contend that -- say that again.

14 MS. BENFIELD: We don't dispute that this is a debt
15 that the debtors owed --

16 THE COURT: Okay.

17 MS. BENFIELD: -- that they have this obligation to
18 pay NCR's cleanup costs going forward and, but for the
19 bankruptcy, they would have.

20 So, in conclusion, we would just welcome Your Honor's
21 views as to what the key dispositive issues here would be that
22 are appropriate for the scope of discovery. The debtors
23 propose that discovery be limited solely to the issue of
24 whether or not there is the existence of a trust race. And
25 what we would propose is that the parties begin discovery as to

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1 appropriate issues under the scheduling order that's currently
2 in place and that maybe we then set this matter for another
3 status conference in forty-five days or so. And we can revisit
4 any discovery issues at that time and we can discuss whether or
5 not summary judgment might be appropriate at that point after a
6 bit of discovery has been completed.

7 THE COURT: All right. Mr. Hamermesh, do you want to
8 be heard?

9 MR. HAMERMESH: Yes, Your Honor. I don't disagree
10 with a lot of what Ms. Benfield said. I think there isn't a
11 great need to dig through 3,000 or how ever many boxes out in
12 Pontiac. In our view, there are really a couple of issues. I
13 don't know if Your Honor had a chance to look at the complaint.
14 But the basic issue is there was a settlement agreement and a
15 consent order issued by the Court in Ohio who was presiding
16 over the case. Our position is that -- well, the documents say
17 themselves that there's something called the total overage
18 which is the amount of the overpayment. And it says that that
19 is something that it belongs to NCR but it's held by GM. Our
20 position, first of all, is that's dispositive on our claim that
21 there is something held in trust.

22 And really, I think the two odd areas of discovery
23 that we think need to be pursued are, one, this issues Ms.
24 Benfield points out about a trust race; and, second of all,
25 generally the negotiations of and drafting of the settlement

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1 agreement and consent order I mentioned. I don't think if
2 those were principally, as I understand it, negotiated between
3 outside counsel for NCR and outside counsel for GM then we
4 would want documents from them and depose them. I think that's
5 maybe four or five depositions total.

6 And then, I think really the bigger part of discovery
7 is discovery concerning whether there's a trust race. So I
8 don't agree that that's a dispositive issue. But obviously,
9 it's one we would need to look into and I don't think Ms.
10 Benfield disagrees with that. And as I outlined to her
11 previously, I think the germane issues we would be looking at
12 on that are bank records relating to GM's account and
13 accounting records concerning this total overage. You know,
14 those are a substantial number of documents but I think they're
15 different documents than the boxes that are out in Pontiac.
16 And I think that, by their nature, they're documents, I would
17 hope, that the debtor would have ready access to and, if not
18 the debtors then New GM who, I understand, we may need to seek
19 discovery from.

20 THE COURT: Pause, please, Mr. Hamermesh.

21 MR. HAMERMESH: Yes.

22 THE COURT: I understand the point that you made
23 about not needing to see all those boxes in Michigan. But I'm
24 puzzled about the discovery as to whether or not there's a
25 trust race. It would have seemed to me that if there were a

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1 trust race, your client would already know about it.

2 MR. HAMERMESH: Your Honor, I would have hoped that
3 would be the case and that would make the case a lot easier for
4 us. But the fact of the matter is that we just don't know. We
5 entered into an agreement with GM and then they went off and
6 did what they did. And now we're trying keep that -- to
7 enforce that position. Given that, we need productive
8 discovery to find out what money -- how the account was formed
9 for this, whether there was a separate account set up, whether
10 there was a specific account from which the payments were made.
11 And, frankly, Your Honor, our position would be that, for
12 example, if there were payments that were made on this overage
13 before the bankruptcy -- not a lot, a couple of hundred
14 thousand dollars maybe. So, for example, I think if the
15 debtors, as part of their deficiency, had paid -- made all of
16 those payments from a specific account and that account always
17 has more money in it than the amount of the overage than the
18 amount of the overage, I think that would be strong evidence in
19 our support. But we just don't know that. That's what we need
20 to look into.

21 THE COURT: All right. Ms. Benfield, do you wish
22 to -- or, forgive me. Mr. Hamermesh, did you finish?

23 MR. HAMERMESH: (No audible response)

24 THE COURT: Mr. Hamermesh?

25 MR. HAMERMESH: I'm sorry. I didn't -- hello?

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1 THE COURT: Yes. Did you finish -- did you have
2 further comments?

3 MR. HAMERMESH: No. I was done.

4 THE COURT: Okay. Ms. Benfield, any further
5 thoughts?

6 MS. BENFIELD: I think that the parties are
7 essentially in agreement that some discovery as to the
8 existence of a trust race and the accounting records is
9 reasonable. We think that these can probably be obtained from
10 New GM, General Motors LLC.

11 As to the depositions of four or five individuals
12 involved in the past negotiations of this, I don't see how
13 that's particularly relevant and it imposes somewhat of a
14 burden because this happened years ago, these counsel are no
15 long with their firms and whatnot. And it just doesn't seem
16 highly relevant. The settlement agreement and the district
17 court judgment essentially entering the settlement agreement
18 speak for themselves. So I think that the debtors would
19 just --

20 THE COURT: Ms. Benfield, didn't what the two lawyers
21 said to each other -- isn't that classic material that is at
22 least potentially relevant to the construction of a document if
23 a Court finds any ambiguities in it?

24 MS. BENFIELD: Yes, I think so. But I think that we
25 would say that the absence of a trust race here would be

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1 dispositive anyway, regardless of the parties' intent to create
2 a trust. If there's no trust race, there cannot be a trust.

3 THE COURT: Well, you may win on that when summary
4 judgment is determined. But each side is entitled to get the
5 evidentiary underpinnings for trying its case as it wants to,
6 isn't it?

7 MS. BENFIELD: I think that we can -- what we should
8 do is what I propose which is allow discovery to begin and
9 then, if we could come back in forty-five days or thereabouts
10 and discuss whether or not summary judgment would be
11 appropriate at that time with the idea that perhaps the parties
12 could move for summary judgment before full blown, you know,
13 six months of discovery and a number of depositions.

14 THE COURT: All right. Both sides had a chance to
15 now be heard fully?

16 MR. HAMERMESH: Yes, Your Honor.

17 THE COURT: All right. We're going to slice and dice
18 the issues in this way. I see no need at this point, if ever,
19 to have any discovery on the underlying environmental
20 violations or cured-of efforts. I think you're aware, Mr.
21 Hamermesh, of the difficulty of establishing a constructive
22 trust and, for that matter, an express trust in the southern
23 district of New York --

24 MR. HAMERMESH: Yes, Your Honor.

25 THE COURT: -- and in the Second Circuit. But you're

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1 entitled to your opportunity to get any evidence that you need
2 to lay out your position satisfactorily.

3 I am strongly inclined to allow a motion for summary
4 judgment on this. But I do believe that, consistent with what
5 used to be Rule 56(f) -- I think the numbering has been
6 changed -- you're entitled to the usual stuff that might be
7 relevant to the summary judgment issue.

8 So you and Ms. Benfield are to come together to
9 arrange for discovery on each of the two general areas for
10 which you want discovery and which I haven't carved out, those
11 being the existence vel non of a trust race and the negotiation
12 and drafting of the document which provides the underpinnings
13 for your claims. Attorneys may be deposed. The fact that
14 they're attorneys, by that alone, does not give them a
15 get-out-of-jail-free card from the duty to be deposed. But, of
16 course, they will have the usual rights to assert privilege.
17 It seems to me that what is potentially important, assuming you
18 get past the issue of whether or not there's ambiguity, is what
19 each attorney said to the other side rather than what he or she
20 was secretly thinking or communicated to the client. This is
21 freshman contracts. But I am not closing the door to
22 depositions or to attorney depositions at this point.

23 I want you guys to make it happen, get the discovery
24 complete. And then I will permit a motion for summary judgment
25 and consider the requirement for a pre-motion conference on

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1 summary judgment waived or satisfied.

2 Not by way of reargument, are there any questions,
3 either side?

4 MR. HAMERMESH: No, Your Honor.

5 MS. BENFIELD: No, Your Honor.

6 THE COURT: All right. Let's make it happen, folks.

7 MS. BENFIELD: Thank you.

8 THE COURT: Right.

9 MR. HAMERMESH: Thank you very much.

10 THE COURT: Mr. Hamermesh, if you want to get off the
11 phone, you're free to do that.

12 MR. HAMERMESH: Thank you, Your Honor.

13 THE COURT: Mr. Smolinsky?

14 MR. SMOLINSKY: Thank you, Your Honor. Again, Joseph
15 Smolinsky. May I ask, Your Honor, if Mr. Mealer is now on the
16 phone?

17 THE COURT: Mr. Mealer?

18 MR. MEALER (TELEPHONICALLY): Yes. Yes, it is, Your
19 Honor.

20 THE COURT: Okay.

21 MR. SMOLINSKY: Your Honor, this matter is an
22 objection to Mr. Mealer's 230 million dollar administrative
23 expense claim under theories of respondeat superior asserting
24 various related causes of action including defamation of
25 character, trade libel and interference with Mr. Mealer's

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1 prospective advantage.

2 I know that, as usual, Your Honor has reviewed the
3 entire record of this matter which is quite voluminous. So I
4 won't burden the Court with going through all of the facts.
5 But I think it would be helpful to highlight a bit of the
6 chronology here.

7 Mr. Mealer set up a website, I believe in 2009, for
8 the purpose of touting his new automotive technology and his
9 dream of a future automotive company that could rival the
10 current OEMs, Ford, General Motors and Chrysler. His website
11 contained a blog. Mr. Mealer is very knowledgeable about blogs
12 and he spends quite a bit of his time in that activity. On his
13 website, he invites comments to his statements and his vision.

14 In June 2009, just nine days after the bankruptcy was
15 filed, Kris Kordella, who is a former General Motors employee,
16 posted a comment in reaction to some negative comments
17 allegedly made by Mr. Mealer in Automotive News on Mr. Whitaker
18 who had recently become the CEO of GM.

19 The comments could only be described as drivel and
20 the type of nonsense that one often sees on the internet.
21 Since it is so important to this, I just want to read the
22 comment that is at the center of this dispute. The posting by
23 Mr. Kordella says to JL -- John L. Mealer, "What a funny guy re
24 your senseless blog to the Automotive News article on Whitaker.
25 Mealer Automobiles? America's next major automobile company???

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1 Hah! And then maybe twelve or fifteen exclamation points.
2 You're a legend in your own head. And notice, I didn't say
3 mind because it's obvious you don't have one. Anyway, I wish
4 you all the worst the world can give to such a self-serving
5 pathetic moron. Good riddance, clown. Sincerely, Kris K." --
6 and then in parentheses -- " a real engineer of real
7 automobiles." That is the single post by Mr. Kordella.

8 Mr. Kordella never identifies himself in the posting
9 by name other than to say Kris K. He uses a moniker, Money01.
10 Mr. Mealer suggests that Mr. Kordella professes to be a
11 financial guru and that's why he used that moniker, although
12 his posting certainly doesn't leave one with the impression
13 that he's a financial guru.

14 Furthermore, Mr. Kordella never identifies himself as
15 a GM engineer. He simply says that he's an engineer.

16 To the contrary, Mr. Mealer then goes out and
17 investigates Mr. Kordella's ISP, which, I guess, is the
18 internet locator, to determine that it was sent from a GM
19 location which could have been at home or office. And Mr.
20 Mealer himself then identifies Mr. Kordella as a General Motors
21 employee and engineer.

22 The posting, as I think Your Honor would agree,
23 contains no factual falsehoods or makes any statements about
24 the viability of Mr. Mealer's technology or the viability of
25 his company. It is simply filled with nonsensical personal

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1 attacks, it would appear.

2 Interestingly, in subsequent pleadings in his reply,
3 Mr. Mealer admits that by highlighting Mr. Kordella's
4 involvement that he was attempting to use the attention of a
5 corporate giant GM -- this is a quote -- "to inspire others to
6 potentially invest in the underdog". So it's clear that Mr.
7 Mealer was using this posting in order to gain interest in his
8 company.

9 Subsequent to that, Mr. Kordella submitted an apology
10 apologizing for his comments and Mr. Mealer put that up on his
11 site and made some comments that this issue is behind us.

12 Despite the fact that Mr. Mealer is obviously very
13 computer savvy, he never removes the offending remarks. Those
14 remarks remained on the site throughout 2010 and they may very
15 well still be there. So to the extent that Mr. Mealer believed
16 that these remarks were having a negative impact on his
17 financing activities, he clearly could have mitigated that.
18 And he, in fact, had sole control over his website. It's not
19 as if this was posted on a third party's website.

20 Over the next several months, Mr. Mealer continues to
21 make postings on his blog through January 2010 where he posts
22 rosy predictions about his ability to raise capital, that money
23 and financing is right around the corner. And in our papers,
24 we cite to those posts.

25 In October 2009, Mr. Mealer files personal bankruptcy

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1 in Arizona. He never lists a claim against General Motors in
2 his papers, in his schedules of assets and liabilities. And
3 the trustee, who was aware of these claims through subsequent
4 proceedings, never pursues the claim against GM.

5 Mealer then files an ad --

6 THE COURT: Pause, Mr. Smolinsky. He didn't schedule
7 the potential claim at the outset. I had thought, rightly or
8 wrongly, that when the deficiency was noted, he amended his
9 schedules.

10 MR. SMOLINSKY: That's possible, Your Honor. I don't
11 recall that but you may be correct.

12 THE COURT: All right. Go on. But your point is
13 that the trustee knew about the claim and determined that the
14 trustee did not want to pursue it.

15 MR. SMOLINSKY: Correct. Whether it was ultimately
16 scheduled or not, this presumably was an estate action and the
17 trustee could have pursued the action but elected not to.

18 Mr. Mealer then files an adversary proceeding in his
19 bankruptcy case against MLC, Motors Liquidation Company, New GM
20 and GMAC. And in that complaint, he seems to be alleging that
21 the conspiracy is that Motors Liquidation Company assisted GMAC
22 in destroying Mr. Mealer's company in order to be able to
23 foreclose on his house. That conspiracy has obviously now
24 shifted. GMAC is no longer in the picture in terms of his
25 claims. And now he's alleging that it was a GM instigated

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1 conspiracy to destroy his business.

2 Of course, Your Honor, that action in the bankruptcy
3 court was dismissed. After an unsuccessful filing of a motion
4 in this case in order to establish procedures for pursuing his
5 claim -- and I believe Your Honor may have dismissed that on
6 procedural grounds for failure to state a claim in the way that
7 it was postured -- Mr. Mealer then commenced an action in state
8 court in Arizona against the same parties alleging the same
9 facts as are part of his claim in this court.

10 The procedural history of that is set out in our
11 papers. But ultimately, that action was removed from state
12 court in Arizona to district court in Arizona and the action
13 was dismissed. An appeal now sits with the Ninth Circuit Court
14 of Appeals of that dismissal. And the Ninth Circuit recently
15 issued an order denying Mr. Mealer's request to proceed in
16 forma pauperis because of a finding by that Court that the
17 appeal was frivolous. The Court also required Mr. Mealer to
18 show cause why the appeal should not be summarily affirmed.

19 The bottom line is that it is obvious that there is
20 no conspiracy here. There's simply a nonsensical posting on a
21 blog. There's no specific allegations as to what funding was
22 on the verge of being obtained and then was lost as a result of
23 this posting. And it's ludicrous to conclude that a potential
24 investor looking at Mr. Mealer's plan which shows, according to
25 his papers, that by 2018 his company was going to be generating

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1 sixty-three billion dollars of revenue and showing positive net
2 income of over sixty billion dollars. It's ludicrous to assume
3 that an investor serious in investing in a business of that
4 type would draw its interest as a result of this specific blog
5 posting which, as I said, is totally nonsubstantive.

6 Our reply sets forth various cases which talk about
7 defamation. And we would suggest that those cases clearly
8 indicate that this type of blog posting, particularly on the
9 internet with the typos and the hyperbole, could never be used
10 as a basis for defamation under Arizona law or could it
11 never -- and it could never be taken as a serious statement of
12 fact to be relied upon.

13 As the district court found in dismissing the claim
14 against Mr. Kordella in the district court action, the Court
15 found that Mr. Kordella could not have known that this harm was
16 likely to be suffered in Arizona because it is simply not
17 likely that any blog posting could cause such a response from
18 serious investors especially if Mr. Mealer's automobile is
19 truly revolutionary.

20 Equally failing, Your Honor, is Mr. Mealer's
21 assertion of respondeat superior. It is simply not plausible
22 that if GM wanted to destroy Mr. Mealer's company that this is
23 the way that it would go about doing that.

24 Finally, Your Honor, on the issue of respondeat
25 superior, I would just note -- and I know this has been

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1 addressed in other Courts. But to the extent that it is
2 respondeat superior and Mr. Kordella was acting in the ordinary
3 course of his employment, that would actually be a claim that
4 New GM had assumed as part of the master sale and purchase
5 agreement. I don't think that we necessarily need to get to
6 that issue today. But I just wanted to note for the record
7 that if this was in the ordinary course of GM's business, it
8 would not be the debtors' liability.

9 My only other point -- and then I'll sit and let Mr.
10 Mealer have his time to argue. When looking at whether this is
11 an administrative expense claim and looking at Section 503 of
12 the Bankruptcy Code, I would just suggest that a finding that
13 these damages are an actual necessary cost and expense of
14 preserving the estate has no basis in the law. Typically, I
15 would understand an argument that if a tort is committed in the
16 course of a business and there's benefit to running that
17 business that that could give rise to an administrative expense
18 claim, certainly. But I don't think that this blog posting is
19 the kind of activity that is tied to the preservation of the
20 debtors' automotive business. Thank you, Your Honor.

21 THE COURT: All right. Mr. Mealer?

22 MR. MEALER: Yes, sir. Yes, Your Honor.

23 THE COURT: I'll hear your argument now.

24 MR. MEALER: Okay. I could barely make out anything
25 that the opposing counsel said but I'll assume it's the same

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1 arguments they've been using the entire time.

2 The incident that occurred on June 9th with Mr.

3 Kordella entering my website with two other GM employees that
4 was goading him on because they were simultaneously on the
5 website --

6 THE COURT: Just a minute, please, Mr. Mealer. Adi
7 (ph.), turn -- just a minute, please. Turn off that blower.

8 (Pause)

9 THE COURT: Continue, please, Mr. Mealer.

10 MR. HAMERMESH: Oh, yes, sir. Your Honor, as seen on
11 our website that was clearly outlined in his website, was for
12 my prospective funding. Mr. Kordella's comments were a direct
13 attack upon me to interfere with my prospective funding in such
14 a manner as to tell my prospective investors and clients that I
15 was insane or without a mind, a moron. Later on, he followed
16 up with e-mails saying I could not be trusted. I was a liar; I
17 was a fraud. And this was all done through GM's equipment
18 where -- that was assigned specifically to Mr. Kordella where
19 he was trained.

20 I've provided plenty of case law that shows that
21 GMAC -- or GM -- sorry -- is liable because of the type of
22 equipment and the agreement that Mr. Kordella made with GM or
23 GM made with Mr. Kordella. And any such private apology such
24 as he sent to me by e-mail that I had cut and paste and put on
25 my website in trying to patch up with my prospective investors

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1 that has received Mr. Kordella's comments through the RSS feed
2 which even your Court allows RSS feed.

3 The damage was done immediately and I tried to patch
4 it up by pretending and playing it off like, oh, Mr. Kordella
5 and I -- hey, we've worked it out. But the damage had already
6 been done. There was nothing I could do to take back what
7 damage was already caused. I believe GM's counsel, Mr. --

8 THE COURT: Is there a reason -- pause, please, Mr.
9 Mealer. Is there a reason if you believe that the damage had
10 already been caused that you said what you said instead of
11 saying it's too late for apologies or words to that effect?

12 MR. MEALER: Well, no. The damage has been done.
13 But I was attempting to undo any damage that would have
14 continued from this from -- by, you know, posting Mr.
15 Kordella's private apology. What I wanted was a GM public
16 apology. And GM, of course, refused that. I just believe that
17 if I played it off as if it was, you know, company to company
18 banter, I might be able to salvage some of my investors. But
19 some of Mr. Kordella's comments combined with whatever natural
20 effects chased them away.

21 THE COURT: Go on.

22 MR. MEALER: It's not like I made this up where I
23 could make him do this to me. This is what happened. And the
24 result is my company is dead. And essentially, this was just
25 not what I intended. I'd rather be building automobiles than

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1 arguing with General Motors, a company that I admire.

2 THE COURT: Further points, Mr. Mealer?

3 MR. MEALER: And whether I was building, you know,
4 the tri -- the three-wheel vehicles or was able to get the full
5 scale manufacturing which is what I was going for, my business
6 would exist. My name would not be blackened out, would not be
7 known as the moron and the non-engineer to everyone because GM
8 told them I was. In fact, my engineers -- a couple of them
9 actually came from GM. And they have threatened to take this
10 out on me. I hope they weren't referring to legal matters
11 because I promised them we're going to be going full steam here
12 in the full of 2009 when funding was settled in the summer of
13 2009.

14 And everybody's waiting to watch the outcome of this
15 and, I don't know. I just wish I had a lawyer to do this for
16 me because I'm lost here in court. I tried to put together
17 good documents for you. I apologize if they weren't smooth
18 flowing but --

19 THE COURT: All right. Anything else?

20 MR. MEALER: And as I said, I could barely make out
21 any of the words that GM was just saying.

22 THE COURT: Well, I heard him okay, Mr. Mealer. Is
23 there a reason why, if you couldn't hear him or if he sounded
24 mumbled, you didn't say something at the time?

25 MR. MEALER: The telephonic conference information

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1 says do not interrupt so I did not want to interrupt him and
2 step out of line. It says don't interrupt when somebody else
3 is talking. So I was really just trying to listen carefully.

4 THE COURT: All right.

5 MR. MEALER: I'm going to assume that it's just the
6 same thing they've been telling me or telling the Court which
7 has all been argued in my complaint and all the other documents
8 I attached and sent to the Court, emergency addition, response
9 and clarification.

10 You know, the signed confession from Mr. Kordella, of
11 course, with Mr. Burgel and Ms. Garwood -- obviously, I
12 couldn't charge them or say anything because they were only on
13 the website at the exact same time as Kordella was and on the
14 same pages that he was on. But they didn't actually type the
15 claim themselves as the real engineer of real automobiles.
16 Probably didn't do the typing.

17 And I don't know who was standing next to Mr.
18 Kordella, I don't know if it was a -- I don't know who was
19 standing next to him goading him or discussing any of this
20 'cause I can't get disclosure one way or the other from GM. I
21 guess it's all moot because they probably threw away all their
22 old equipment. Not meaning to sound rude but I don't know what
23 they've done, subsequent site, that is.

24 THE COURT: All right. Mr. Mealer, we've had a lot
25 of pauses. Do you have any -- and this is just the most recent

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1 of them. Do you have any further comments?

2 (Pause)

3 THE COURT: Mr. Mealer?

4 MR. MEALER: I'm trying to -- we're breaking up, too.
5 I thought you were -- somebody else was talking. I believe I
6 spelled out everything in my complaint fairly clearly. I
7 believe my case law is there. I'm not a lawyer. I'm not
8 familiar with pressing a federal case or even a local case. I
9 just hope this stands on what was done to me, relieve some of
10 the damages that were done to me, to my company, and that GM is
11 held accountable for what they've done. Other than that, I
12 have nothing else to say except I appreciate your time.

13 THE COURT: Okay. Thank you.

14 MR. MEALER: Thank you, Your Honor.

15 THE COURT: Mr. Smolinsky, reply?

16 MR. SMOLINSKY: Thank you, Your Honor. Mr. Mealer
17 has obviously gone through some difficult times of late and we
18 certainly sympathize with his difficulties. But it doesn't --

19 THE COURT: Pause, please, Mr. Smolinsky. Mr.
20 Mealer, I assume you can now hear Mr. Smolinsky?

21 MR. MEALER: I can hear you, yes.

22 THE COURT: No. Did you hear Mr. Smolinsky when he
23 was speaking?

24 MR. MEALER: Oh, no. No, I did not hear him, Mr.
25 Smolinsky.

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1 THE COURT: Well, I heard you fine, Mr. Smolinsky,
2 but take that microphone, bring it close to your mouth and I'm
3 giving you permission to scream.

4 MR. SMOLINSKY: Mr. Mealer, can you hear me now?

5 MR. MEALER: Yes. Now I can.

6 MR. SMOLINSKY: Okay. Mr. Mealer has obviously had
7 some difficult times of late and we're certainly sympathetic
8 with that. But I just want to reiterate that it was Mr. Mealer
9 who called Mr. Kordella out as a GM employee. Mr. Mealer
10 posted subsequent postings after this where he indicated that
11 financing was right around the corner. In his response papers,
12 he suggests that he only did that to try to rekindle the
13 interest that was lost. But to the extent that he was
14 falsifying his e-mail postings to reflect the fact that there
15 was financing when, in fact, there wasn't, these are the same
16 types of falsehoods that he's alleging GM committed.

17 Nowhere in Mr. Mealer's comments did he talk about
18 any specific financing, any letter of intent, any financing
19 proposal that was pulled off the table as a result of this
20 comment. And again, I find it hard to believe that that would
21 ever happen in our current -- the current financial world in
22 which we live where almost every new idea is criticized. Here,
23 the idea wasn't even criticized; it was just a personal attack.
24 We just don't see how that could possibly have led to the
25 damage that is alleged. And I just want to reiterate the fact

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1 that there are no specific facts about any financing that was
2 lost as a result of this. Thank you.

3 THE COURT: All right. We're going to take a recess
4 until approximately a quarter to 11. And that's a quarter to
5 11 Eastern time. And, Mr. Mealer, you just stay on the phone.
6 We're in recess.

7 (Recess from 10:33 a.m. until 11:01 a.m.)

8 THE COURT: Have seats, please. I apologize for
9 keeping you all waiting. Mr. Mealer, are you still with us?

10 MR. MEALER: Yes, sir, Your Honor.

11 THE COURT: Okay.

12 MR. MEALER: Your Honor, if I may?

13 THE COURT: Mr. Mealer, I'm about to rule. Do you
14 have some comment you want to make before I do?

15 MR. MEALER: Yes, sir. Sorry. Yes, sir, Your Honor.
16 I heard the opposing counsel mention that I falsified
17 something. To be clear, I falsified nothing and not quite
18 certain what he was referring to. I just want to make it clear
19 that honesty is all I've got. I do not falsify anything.

20 THE COURT: What Mr. Smolinsky's point, Mr. Mealer,
21 is that when you filed your petition and the schedules and
22 statements upon which you are required to show your assets that
23 you failed to show the right to sue GM as a result of
24 Kordella's actions. And I think the facts are undisputed that
25 you didn't show the existence of that cause of action in your

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1 schedules. Is it your position that there should be a dispute
2 as to that or that you cured that deficiency later or what?

3 MR. MEALER: Oh, Your Honor, I did mention that.
4 That was ruled upon by the Arizona district -- or the Arizona
5 bankruptcy court because it was an abandoned claim once I
6 listed it.

7 THE COURT: Once you listed it.

8 MR. MEALER: Of course, I don't have the document in
9 front of me because I wasn't prepared for this. That was
10 listed and the trustee abandoned that claim and it reverted
11 back to me --

12 THE COURT: All right.

13 MR. MEALER: -- what was ruled upon.

14 THE COURT: All right. Mr. Mealer, I'm now ready to
15 rule if you'll allow me to.

16 In this contested matter in the jointly administered
17 Chapter 11 cases of Motors Liquidation Company, formerly
18 General Motors Corporation, which I'll refer to as Old GM or
19 the debtors, the debtors object to the 230 million dollar
20 administrative proof of claim filed by John M. Mealer. Mr.
21 Mealer's claim seeks recovery on underlying causes of action
22 against the debtors for negligent entrustment defamation,
23 intentional interference with business relations and trade
24 libel arising out of actions taken by Kris Kordella, an
25 employee of General Motors.

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1 The debtors assert that Mr. Mealer's proof of claim
2 must be disallowed because the debtors cannot be held liable
3 for Mr. Kordella's actions under a theory of respondeat
4 superior because Mr. Mealer's proof of claim and the underlying
5 complaint failed to state a claim upon which relief can be
6 granted because his claim is barred by the doctrine of accord
7 and satisfaction and because any liability of the debtors for
8 these claims was assumed by New General Motors if, in fact,
9 they had been ordinary course activities.

10 While all of these defendants might well have --
11 excuse me. While all of these defenses might well have merit
12 if ultimately addressed, even without considering how the
13 showing made here could justify an award of 230 million
14 dollars, I need address only a few of them. I find that the
15 debtors cannot be held vicariously liable for defamation,
16 intentional interference with business relations and trade
17 libel or for any other tort claim that Mr. Mealer might assert
18 arising out of Mr. Kordella's actions at issue here.

19 In addition, I find that Mr. Mealer has failed to
20 state a claim for negligent entrustment, a tort that would be
21 associated with or result from a direct liability.

22 I also find that the claims failed to meet the
23 plausibility requirements imposed by the United States Supreme
24 Court in its *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*
25 decisions. My findings of fact and conclusions of law follow.

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1 Turning first to my findings of fact. Mr. Mealer is
2 the principal of Mealer Companies LLC, an alternative fuel
3 automobile manufacturing company. In 2009, Mr. Mealer began
4 soliciting funding for his company to begin production of
5 alternative fuel automobiles. In May of that year, he mailed
6 the Mealer Companies' "funding request summary" to various
7 prospective investors and set up the website
8 mealerscompanies.com to garner funding and support for his
9 company.

10 On June 1st, 2009, the debtors filed Chapter 11
11 petitions in this court. Sometime after the commencement of
12 the Chapter 11 cases, in early June 2009, Mr. Mealer commented
13 about Old GM's bankruptcy filing on an Automotive News blog.
14 Kris Kordella, an engineer employed by GM at the time, saw Mr.
15 Mealer's comments and, on June 9, posted a response on
16 mealercompanies.com. Mr. Kordella's post said, and I'm
17 quoting, "To JL, What a funny guy re: your senseless blog to
18 the Automotive News article on Whitaker. Mealer Automobiles?
19 America's next major automobile company?? HAH!"-- and then
20 about a dozen exclamation points. "You're a legend in your own
21 head. And notice I didn't say mind because it's obvious you
22 don't have one. Anyway, I wish you ALL the worst the world can
23 give to such a self-serving pathetic MORON. Good riddance,
24 clown. Sincerely, Kris K." (a real engineer of real
25 automobiles) ."

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1 I note, in connection with the language I just quote,
2 that Mr. Kordella did not say that he was acting in any way on
3 behalf of GM or even mention GM.

4 According to Mr. Mealer, this post was made using a
5 General Motors computer. Mr. Mealer also states that the post
6 was sent out to anyone who subscribed to the
7 mealercompanies.com RSS feed. Mr. Mealer also alleges that Mr.
8 Kordella sent e-mails from within GM offices "via inter-
9 corporate secured ISP equipment to Mealer's prospective
10 advantageous parties".

11 On June 15, 2009, Mr. Kordella sent an apology to Mr.
12 Mealer explaining that as an employee of General Motors, he was
13 upset by the recent bankruptcy and by Mr. Mealer's posts on the
14 Automotive News blog. Furthermore, Mr. Kordella stated, "The
15 bottom line is I shouldn't have resorted to the knucklehead
16 name-calling in my blog and inferring your auto company isn't
17 legit, because I'm sure it is. Please consider this my apology
18 for the aforementioned actions. Additionally, I wish you and
19 your company great success in the future as any company that
20 can help the United States get more GREEN is a noble company
21 and should be commended for their work. Wishing you the best
22 of luck in the future."

23 That same day, June 15, Mr. Mealer acknowledged Mr.
24 Kordella's apology on his website, stating, and I'm quoting,
25 "Finally, GM's senior engineer, Kris Kordella allowed this

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1 final comment and we can mend fences....we are good to go and I
2 wish GM and Mr. Kordella luck in all aspects."

3 Mr. Mealer did not say, although he argued today that
4 the damage was already done. And that the apology was
5 insufficient in any way.

6 On August 22, 2009, Mr. Mealer posted a website -- a
7 notice on his website responding to and soliciting interest in
8 employment with his company. He wrote, and I'm quoting, "Quite
9 a few people have inquired about opportunity with Mealer
10 Companies, LLC. Funding is not one hundred percent yet. But
11 as we get to that point, we will need hundreds of people for
12 immediate help within the company plus the hundreds in the
13 construction industry as well as thousands more in the
14 companies related to our manufacturing end products."

15 On September 26th and again on October 24, 2009, Mr.
16 Mealer posted notices on his website indicating that the
17 business had been progressing rapidly, that "If all goes well,
18 you will see our bridge vehicle hitting the market in the next
19 eighteen months" and that "We expect to begin making major
20 advances to bringing our product to manufacturing and to market
21 by fall 2010."

22 Then on January 1, 2010, Mr. Mealer posted on his
23 website that "Mealer Companies, LLC has a quite (sic) a bit
24 going for the company this year. Funding is just around the
25 corner...."

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1 According to Mr. Mealer, he was, at some point, in
2 discussions with several prospective investors interested in
3 providing 200 million of funding and with prospective dealers
4 interested in purchasing about thirty million dollars worth of
5 automobiles. Those two numbers presumably provide the basis
6 for the 230 million dollars he now wishes to recover from Old
7 GM and its creditors.

8 On October 4, 2009, Mr. Mealer filed a voluntary
9 Chapter 7 petition in the United States Bankruptcy Court for
10 the District of Arizona. It is alleged that the Chapter 7
11 trustee, in his individual Chapter 7 case in Arizona, who would
12 otherwise have the ability to assert those claims on behalf of
13 Mr. Mealer's Chapter 7 estate, abandoned those claims. Of
14 course, we know as a matter of Chapter 7 law, that a Chapter 7
15 trustee is entitled to abandon claims that the trustee deems to
16 be of negligible value to the estate. And I assume for the
17 purpose of this analysis that the claims thus reverted back to
18 Mr. Mealer.

19 On March 12, 2010, Mr. Mealer filed with this Court a
20 motion to approve procedures for administering claims under
21 Section 503 of the Code seeking tort relief from the debtors.
22 I denied that motion for failure to show a prima facie
23 entitlement to relief.

24 On March 30, 2010, Mr. Mealer commenced an adversary
25 proceeding against both Old GM and New GM in his Arizona

1 Chapter 7 case. The complaint filed in that proceeding alleged
2 causes of action for, among other things, intentional
3 interference with prospective economic advantage and
4 defamation, claims similar to those that Mr. Mealer asserts
5 here.

6 On April 29, 2010, the debtors filed a motion in the
7 Arizona bankruptcy case to dismiss the adversary complaint on
8 the grounds that (1) it violated the automatic stay as to Old
9 General Motors; (2) Mr. Mealer lacked standing to bring the
10 adversary proceeding because a standing was transferred to an
11 appointed trustee when he filed his Chapter 7 case and the
12 trustee had not then abandoned the claims; and (3) that
13 adversary complaint failed to state a claim on which relief
14 could be granted.

15 New GM also filed a motion to dismiss arguing that it
16 didn't assume liability for those claims under the sale
17 agreement and that my court, the Chapter 11 Court with
18 jurisdiction over GM's -- Old GM's Chapter 11 case, retained
19 jurisdiction to determine all issues related to the sale
20 agreement.

21 On June 2, 2010, the Arizona bankruptcy court granted
22 both motions to dismiss without leave to amend "based on the
23 orders entered by the bankruptcy court and the injunctions or
24 retention of jurisdiction provisions therein".

25 On June 8, 2010, Mr. Mealer then filed a complaint in

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1 Arizona state court against the debtors, New General Motors and
2 Mr. Kordella. The complaint in state court was never served on
3 the debtors. New GM removed the action to federal court. And
4 both New GM and Mr. Kordella filed motions to dismiss.
5 Notwithstanding my court's exclusive jurisdiction to enforce
6 and implement the sale order and sale agreement, the Arizona
7 federal district court ruled on the motion, that New GM's
8 motion to dismiss was granted because GM did not assume
9 successor liability. The Court also granted Mr. Kordella's
10 motion to dismiss.

11 In that connection, the Arizona district court ruled
12 "Mr. Mealer believes that Mr. Kordella's comments intimidated
13 numerous potential investors and ultimately kept his 200
14 million dollar stream from materializing. Mr. Kordella could
15 not have known that this harm was likely to be suffered in
16 Arizona because it is simply not likely that any blog posting
17 could cause such a response from serious investors, especially
18 if Mr. Mealer's automobile is truly revolutionary."

19 On February 5th, 2011, Mr. Mealer then filed an
20 administrative proof of claim in the Chapter 11 cases before me
21 seeking 230 million dollars for a defamation of character,
22 trade libel and intentional interference with Mr. Mealer's
23 prospective advantage. His proof of claim and attached
24 documents state that his claims are for "respondeat superior"
25 and allege that "General Motors Corporation engineering

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1 employee, Mr. Kris J. Kordella" visited claimant's website
2 "using a GM computer and IP address...and posted various
3 injurious falsehoods about Mr. Mealer and the Mealer automobile
4 thus unlawfully destroying growth funding and the 'rival'
5 business of Mealer's Companies, LLC."

6 Mr. Mealer asserts that Mr. Kordella's actions caused
7 him "to lose prospective funding to the tune of 200 million
8 dollars" and "prospective sales [worth] 30 million dollars".

9 I turn now to my conclusions of law. As a
10 preliminary matter, I find that the Court has subject matter
11 jurisdiction to hear this matter and that this matter is a core
12 proceeding under which a bankruptcy judge in contrast to a
13 district judge can decide not only disputed issues of law but
14 also disputed issues of fact.

15 28 U.S.C. Section 1334 vests in the district court a
16 broad grant of subject matter jurisdiction over all bankruptcy
17 related matters. And it's fundamental that a motion for
18 allowance of administrative expense invokes all three of the
19 arising-in, arising under and related-to prongs of 28 U.S.C.
20 1334. District courts may, as the district court in this
21 district has under Judge Ward's well known order, refer all
22 matters to which it -- the district court has jurisdiction to,
23 under 1`334, to bankruptcy courts and that is the basis upon
24 which we bankruptcy judges, in lieu of district judges, decide
25 claims allowance matters.

1 Generally, under 28 U.S.C. Section 157(b), a
2 bankruptcy judge may only hear and finally determine core
3 bankruptcy proceedings. Including in the list of such core
4 proceedings is the allowance or disallowance of claims against
5 the estate. However, the list of core proceedings under
6 157(b) (2) specifically excludes personal injury, tort and
7 wrongful death claims. It further provides, that is, 157
8 provides in its subsection (b) (5) that district courts shall
9 order that personal injury, tort and wrongful death claims
10 should be tried in the district court rather than in the
11 bankruptcy court.

12 As my colleague, Judge Lorraine Weil from the
13 bankruptcy court in the district of Connecticut explained,
14 "Personal injury tort claim" is not defined in either the
15 Bankruptcy Code, Title 11, or the Judicial Code, Title 28, and
16 there's almost no helpful legislative history. See her
17 decision in *In re Ice Cream Liquidation Ltd.*, 281 B.R. 154, 160
18 (Bankr. Dist. Conn. 2002).

19 Further, she noted, Courts have adopted two different
20 definitions of the term. The broad view is that the term
21 "personal injury tort claim" applies to "any injury which is an
22 invasion of personal rights." *Id.*

23 Judge Schwartzberg, the late Judge Schwartzberg of
24 this court, adopted the broad view in deciding that a
25 defamation claim brought by a preschool bus driver alleging

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1 that the debtors told other parents that the driver has
2 molested their child was a personal injury tort claim. See In
3 re Goidel, 150 B.R. 885 (Bankr. S.D.N.Y. 1993). Judge
4 Schwartzberg determined that it was appropriate to abstain from
5 deciding whether the defamation claim fell within the exception
6 to discharge for willful and malicious injury until after the
7 state court had rendered judgment in the defamation proceeding.
8 Thus, he lifted the automatic stay to allow the defamation
9 claim to proceed in state court.

10 The narrow view of "personal injury tort claim" is
11 that the term only applies to torts involving trauma or bodily
12 injury. Late Judge Charles Brieant of this court adopted the
13 narrow position in concluding that state ante discrimination
14 law claims were not personal injury tort claims. See In re
15 Cohen, 107 B.R. 453 (S.D.N.Y. 1989), that being a decision of
16 the district court in the Southern District of New York.

17 Neither Judge Brieant's decision nor Judge
18 Schwartzberg's decision, which tend to cut in opposite
19 directions, is binding on me. But for reasons I'll state, it
20 doesn't matter. Ultimately, I agree with Judge Weil's
21 analysis.

22 In the Ice Cream Liquidation decision, Judge Weil
23 criticized the narrow view and eventually concluded that the
24 sexual harassment claims at issue were personal injury tort
25 claims even though no physical bodily injury was involved.

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1 However, she also declined to fully accept the broad view
2 explaining that in enacting 157(b)(5), "Congress cannot have
3 intended...that financial business or property tort
4 claims...could be withdrawn from the bankruptcy system." 281
5 B.R. at 161. She explained that "In cases where it appears
6 that a claim might be a personal injury tort claim under the
7 broader view but has earmarks of a financial, business or
8 property tort claim, or a contract claim," it would be
9 appropriate for a Court "to resolve the personal injury tort
10 claim issue by (among other things) a more searching analysis
11 of the complaint." Id. See also *Harwood's v. Alloy Automotive*
12 Company, 992 F.2d 100, 103 (7th Cir. 1993) (noting that
13 "business torts" should not be "shoehorned" into the category
14 of "personal injury tort claim" under Section 157(b).

15 Using Judge Weil's analysis as a guide, analysis that
16 I find thoughtful and persuasive, I find that the claims that
17 Mr. Mealer asserts here are not personal injury tort claims.
18 Mr. Mealer alleges that Mr. Kordella made defamatory statements
19 about Mealer Companies and about Mr. Mealer in a professional
20 capacity and that Mr. Kordella intentionally interfered with
21 Mealer Companies' prospective business relations.

22 He further asserts that General Motors, a potential
23 competitor of Mealer Companies is liable for the actions of Mr.
24 Kordella, Old GM's employee. These claims are clearly
25 financial or business tort claims. Although in Goidel, Judge

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1 Schwartzberg determined that the defamation claims at issue
2 were personal injury tort claims. The alleged defamatory
3 statements in Goidel involved accusations of sexual molestation
4 whereas the alleged defamatory statements here are alleged to
5 have had a negative effect on Mealer Companies' business acumen
6 and potential for financial success. The defamation claim here
7 is therefore distinguishable.

8 In addition, unlike the plaintiff in Goidel, Mr.
9 Mealer is also asserting claims for trade libel and intentional
10 interference with prospective business relations which are
11 traditional economic or business torts.

12 For these reasons, I find that Mr. Mealer's claims
13 are not personal injury tort claims as that term is used in 28
14 U.S.C. Section 157(b). Therefore, the adjudication of Mr.
15 Mealer's claims in the bankruptcy court is a core proceeding.

16 I also note that although, in noncore matters, a
17 bankruptcy court may not enter final judgment, it still has
18 authority to issue proposed findings of fact and conclusions of
19 law which are reviewed de novo by the district court. See
20 *Marshall v. Marshall*, 547 U.S. 293 at 302 (2006) citing
21 157(c)(1).

22 Moreover, because the debtors' claims objection is
23 treated as a motion to dismiss, all of the facts alleged by Mr.
24 Mealer are taken to be true and I'm not making findings on
25 disputed issues of fact. My rulings, rather, are on matters of

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1 law which are reviewed de novo anyway. Therefore, even if Mr.
2 Mealer's claims were deemed to be personal injury tort claims
3 and this were deemed not to be a core proceeding, I'd still be
4 empowered to make the legal determinations that I'm making
5 here.

6 I now turn to the merits. Mr. Mealer asserts that
7 Mr. Kordella's actions give rise to claims for defamation,
8 trade libel and intentional interference. His claims against
9 the debtors present two theories of liability. First, he
10 asserts a direct claim that the debtors are directly liable for
11 the tort of negligent entrustment. Second, he asserts that the
12 debtors are vicariously liable for any tort for which Mr.
13 Kordella might have been liable based on the doctrine of
14 respondeat superior.

15 First, I find that Mr. Mealer has failed to state a
16 claim for negligent entrustment. Section 502(b)(1) of the Code
17 states that when an objection has been made to a proof of
18 claim, the Court, after notice and a hearing, shall allow the
19 claim "except to the extent that such claim is unenforceable
20 against the debtor and property of the debtor under any
21 agreement or applicable law for a reason other than because
22 such claim is contingent or unmatured". Section 502 instructs
23 Courts to rely on nonbankruptcy law to determine whether claims
24 are enforceable for bankruptcy purposes. See *In re Combustion*
25 *Engineering, Inc.*, 391 F.3d 190, 245, note 66 (3rd Cir. 2005)

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1 citing Collier. "A claim against the bankruptcy estate will
2 not be allowed in a bankruptcy proceeding if the same claim
3 would not be enforceable against the debtor outside of
4 bankruptcy." Id.

5 A motion to disallow a claim under Section 502(b)(1)
6 is treated as a motion to dismiss and the Court must accept as
7 true all well-pleaded factual allegations by the claimant. See
8 *In re GI Holdings, Inc.*, 443 B.R. 645, 664 (Bankr. Dist. N.J.
9 2010). But that requirement still requires the allegations to
10 be well pleaded invoking the doctrine of *Bell Atlantic v.*
11 *Twombly*, 550 U.S. 544, that the factual allegations must be
12 sufficient to raise a right to relief above the speculative
13 level. Also, they are subject to the plausibility requirements
14 of *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

15 I'll come back to the plausibility requirements of
16 those cases, especially those of *Iqbal*, momentarily. But now I
17 turn to the underlying deficiencies that appear whether or not
18 the allegations pass muster under the plausibility test.

19 A federal court sitting in New York will apply New
20 York's choice of law rules to determine which state's
21 substantive law applies. See *In re OPM Leasing Services, Inc.*,
22 40 B.R. 380, 398 (Bankr. S.D.N.Y. 1984). Courts applying New
23 York choice of law rules have generally held that laws
24 regarding defamation and similar torts are "governed by the law
25 of the place where the tort occurred, which is the place where

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1 plaintiff's injuries occurred." (See *Hitchcock v. Woodside*
2 *Literary Agency*, 15 F.Supp. 2nd 246, 251 (E.D.N.Y. 1998)) and
3 that "when the defendant's negligent conduct occurs in one
4 jurisdiction and the plaintiff's injuries are suffered in
5 another...the locus in this case is determined by where the
6 plaintiff's injuries occurred." *Schultz v. Boy Scouts of*
7 *America, Inc.*, 480 N.E.2d 697 (N.Y. 1985).

8 Mr. Mealer resides in Arizona and his company, Mealer
9 Companies, LLC, is registered and operated in Arizona. Any
10 alleged injury occurred in Arizona and Arizona law applies.

11 Under Arizona law, "It is negligence to use an
12 instrumentality whether a human being or a thing which the
13 actor knows or should know to be so incompetent, inappropriate
14 or defective that its use involves an unreasonable risk of harm
15 to others." *Quinonez v. Andersen*, 144 Ariz. 193, 197 quoting
16 Section 307 of Restatement (Second) of Torts. However, "an
17 employer will not be liable for an act of an employee that was
18 not foreseeable." *Pruitt v. Pavelin*, 141 Ariz. 195, 202.
19 Generally, when an employer is found liable for negligent
20 entrustment or hiring, the employer knew or could have learned
21 through reasonable investigation something about the employee
22 or the employee's past that made the employee's harmful conduct
23 foreseeable. For example, in a case cited in *Pruitt*, the
24 Minnesota Supreme Court found that a tenant who had been raped
25 by the manager of an apartment had a cause of action against

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1 the owner of the apartment because the owner had trusted the
2 manager with pass keys without first investigating his
3 background.

4 Here, Mr. Mealer does not allege anything about Mr.
5 Kordella's or Mr. Kordella's past that, if known, would have
6 made it foreseeable that Mr. Kordella would use his computer to
7 post disparaging remarks about Mr. Mealer or his company. And
8 if Mr. Mealer did have a record of using computers to post
9 disparaging remarks on the internet, Mr. Mealer does not allege
10 that Old GM knew or should have known that. It was entirely
11 unforeseeable to Old GM, based on this date of the record, that
12 Mr. Kordella would use his computer to post comments on Mr.
13 Mealer's website and Old GM has not been alleged to have been
14 shown to be negligent in entrusting him with a computer under
15 the facts as pleaded here. Therefore, Mr. Mealer's claim for
16 negligent entrustment fails as a matter of law.

17 Next, I find that even if Mr. Kordella's actions gave
18 rise to legally cognizable claims, that is, if Mr. Kordella
19 himself had taken action which gave rise to legally cognizable
20 claims, the debtors cannot be held vicariously liable for any
21 such causes of action, again, as a matter of law.

22 Vicarious liability or respondeat superior is a rule
23 of loss allocation under New York choice of law rules. See,
24 for example, Zatuchny v. Doe, 825 N.Y. Supp. 2d 458, 459 (1st
25 Dep't 2006). Here, the alleged tortious action, the internet

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1 posting by Mr. Kordella occurred in Michigan and the alleged
2 harm from such action occurred in Arizona where Mr. Mealer
3 resides and where his business is registered. Because the
4 doctrine of respondeat superior under Arizona law and Michigan
5 law is sufficiently similar, the Court needn't undertake a
6 choice of law analysis as to the respondeat superior
7 determination.

8 Under the doctrine of respondeat superior in both
9 Michigan and Arizona, an employer may be vicariously liable for
10 an employee's intentional or unintentional torts committed
11 within the scope of his employment. However, an employer is
12 not liable for acts committed by an employee outside the scope
13 of employment. See *Rogers v. J.B. Hunt Transport, Inc.*, 466
14 Mich. 645, 651 (2002); *Faul v. Jelco Inc.*, 122 Ariz. 490, 492.

15 Under Arizona law, "An employee is acting within the
16 scope of his employment while he is doing any reasonable thing
17 which his employment expressly or impliedly authorizes to do or
18 which may reasonably be said to have been contemplated by that
19 employment as necessarily or probably incidental to the
20 employment." *Ray Korte Chevrolet v. Simmons*, 117 Ariz. 202,
21 207.

22 Similarly, under Michigan law, "Vicarious liability
23 may arise even where the employee's action was not specifically
24 authorized if the act is nevertheless so similar to or
25 incidental to the conduct that is authorized taking into

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1 consideration such matters as to whether the act is commonly
2 done by the employee." Bryant v. Brannen, 180 Mich App 87,
3 98-99.

4 While the issue of whether the employee was acting
5 within the scope of his employment is generally, for the tryer
6 of fact, "where the facts are not in dispute and where no
7 conflicting inferences may reasonably be drawn therefrom, the
8 determination of whether the employee was acting within the
9 scope of his employment is for the Court." Rowe v. Colwell, 67
10 Mich App 543, 550. See also Olson v. Staggs-Bilt Homes, Inc.,
11 23 Ariz. App. 574, 577 (finding that the employee was acting
12 outside the scope of his employment as a matter of law).

13 In this case, I find that even if all of the facts
14 alleged by Mr. Mealer are true, Mr. Kordella was not acting in
15 the scope of his employment as a matter of law and that Mr.
16 Mealer has failed to allege facts establishing that the web
17 post was engaged in -- within the scope of Mr. Kordella's
18 employment.

19 He was employed by GM as an engineer to work on the
20 design and manufacture of vehicles. He was not employed by
21 General Motors in a communications capacity. Nor was he
22 employed for the purpose of making posts on the internet.
23 Posting on the internet or disseminating his own or anyone
24 else's views was not a task that he was asked or authorized to
25 perform as a part of his engineering employment nor was it

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1 incidental or in any way similar to any task he was authorized
2 to do as part of his employment. Therefore, even assuming
3 arguendo that Mr. Kordella's actions gave rise to an actionable
4 tort, finding that is itself negated if not wholly foreclosed
5 by the Arizona district court's findings, the debtors cannot be
6 held liable for any such torts because his actions weren't
7 alleged, or at least satisfactorily alleged, to be within the
8 scope of his employment.

9 Mr. Mealer argues that the debtors are vicariously
10 liable for Mr. Kordella's conduct because GM "trained", "had
11 the right to control", and "supplied the computer equipment"
12 that Mr. Kordella used. Even if true, these facts do not
13 establish that Mr. Kordella was acting in the scope of his
14 employment when he posted on Mr. Mealer's website.

15 Then I further determine that the claims here fail to
16 meet the requirements of Bell Atlantic v. Twombly and Ashcroft
17 v. Iqbal. While over the years, I have rarely invoked the
18 plausibility requirement to find claims insufficient to state
19 claims upon which relief can be granted, this case is a poster
20 child for Iqbal relief. The notion that the childish name-
21 calling that went on here would have resulted in the 230
22 million dollars in damages that underlie this administrative
23 claim is wholly implausible, as noted in the Arizona action.
24 It simply is not likely that any blog posting could cause such
25 a response from serious investors especially if Mr. Miller's

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1 automobile were truly revolutionary.

2 Moreover, there were no credible -- not credible --
3 satisfactorily pleaded of investor action based on the name-
4 calling either before or after the retraction. They were
5 insufficient allegations of what was in the wings that was lost
6 as a consequence of the post. Moreover, it is not plausible
7 that the words that were used by Mr. Korella (sic) would be
8 those upon which any otherwise serious prospective investors
9 would rely. There is no showing that investor interest rose to
10 the level at which the alleged statements could be found to
11 have chilled that interest nor that the requisite causation,
12 the statements chilling investor interest that otherwise was in
13 place, was established under the allegations here.

14 For the foregoing reasons, the debtors are to settle
15 an order disallowing the claim. The time to appeal this
16 determination will run from the time of the entry of the
17 resulting order and not from the time of this dictated
18 decision. We're adjourned.

19 MR. SMOLINSKY: Your Honor, we have additional
20 matters on the calendar.

21 THE COURT: Oh. You have the undisputed matters.
22 Very well. Mr. Mealer, you're free to stay on the phone or
23 leave, as you prefer.

24 MR. MEALER: Thank you, Your Honor.

25 MR. SMOLINSKY: Your Honor, Joe Smolinsky for the

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1 debtors. The first uncontested matter is a motion seeking
2 authorization to assume and assign approximately forty-five
3 contracts to New GM. This will be the last motion to assume or
4 assume or assign contracts. We were permitted under the plan
5 for a period of time after the effective date to continue to
6 utilize 365 to assign contracts. And we are doing so with the
7 request of New GM.

8 These forty-five contracts all relate to dealer
9 agreements that were assumed and assigned much earlier in this
10 case. New GM realized that these ancillary agreements were
11 critical to continuing the dealer relationship and they asked
12 us to assume and assign those contracts. MLC nor the GUC trust
13 have any need for these agreements nor do they want to take the
14 risk of any rejection damage claims caused by an unexpected
15 rejection.

16 We received no objection to the relief requested and
17 we'd ask that the Court approve the assumption and assignment
18 of these contracts.

19 THE COURT: Of course. It's approved.

20 MR. SMOLINSKY: Thank you, Your Honor. The next
21 matter is debtors' 219th omnibus objection to claims. These
22 are contingent co-liability claims. We received five responses
23 which, as usual, we will try to continue to work out
24 consensually. We received no other responses and we'd request
25 that the motion be granted -- or the objection be granted with

1 respect to the defaulting parties.

2 THE COURT: Yes. Granted.

3 MR. SMOLINSKY: Next, Your Honor, is an objection on
4 the same grounds. It's the debtors' 220th omnibus objection.
5 Again, we received five responses which we will adjourn. And
6 we'd ask for disallowance of the claims that have not
7 responded.

8 THE COURT: Yes. Granted.

9 MR. SMOLINSKY: The next matter is debtors' objection
10 to claim number 67121 and 67122. These claims were filed by
11 Superior Industries. We are now at the point that we have a
12 stipulation which we will be able to submit to the Court for
13 approval. And that stipulation would expunge the claims.

14 THE COURT: Sure.

15 MR. SMOLINSKY: Next we have the debtors' fifteenth
16 omnibus objection to claims. The last remaining claim on that
17 objection is the Birdsall claim. We have a stipulation
18 resolving that claim as well which we can submit for
19 consideration.

20 THE COURT: Okay.

21 MR. SMOLINSKY: That takes care of the uncontested
22 matters for this morning. I know that there's a matter this
23 afternoon with respect to New GM. We don't anticipate
24 appearing.

25 Just as one housekeeping matter, we have, as Your

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1 Honor knows, a number of omnibus claim objections where we have
2 one or two remaining claims and we've been unable to resolve
3 those consensually. I think we're at the point now where we
4 need to start bringing those to Your Honor for your
5 consideration. Typically, we contact your chambers and figure
6 out what Your Honor has time to address in any particular
7 hearing. With respect to these motions -- or objections that
8 have been carried time and time again, I think we have to take
9 on this a little bit more proactively so we give other parties
10 a sufficient amount of time to prepare for the hearings. We
11 think we should give them at least a week or more to notify
12 them that their objection is now going forward. So we'll be
13 speaking to chambers unless Your Honor has any ideas on how we
14 can manage the calendar to meet your needs and our needs to
15 start moving forward on more of these remaining matters.

16 THE COURT: Do they involve disputed issues of fact,
17 matters of law or some combination?

18 MR. SMOLINSKY: I think it's a mixed bag, Your Honor.
19 There are some that we believe should be very easily disposed
20 of such as objections to equity claims. And then there are
21 others that we'll have disputes.

22 THE COURT: Well, if they're objections to equity
23 claims, you could do it with a one-page piece of papers. If
24 you're talking about something where facts are in dispute,
25 you're going to have to agree with your opponent on providing

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1 either side with any desired discovery. And then if it really
2 involves issues of fact, you're going to have to do direct
3 testimony affidavits. If it involves expert testimony, I'm
4 going to need expert reports, the whole drill on a disputed
5 issue of fact, evidentiary hearing on contested matters. So
6 don't expect to get those resolved without you guys having done
7 all your homework first. And only then would it be appropriate
8 to set it for trial.

9 If it involves an agreed upon set of facts and a
10 determination of law then you got to agree with your opponent
11 on a briefing schedule. This isn't the kind of thing you do on
12 ten days' notice.

13 MR. SMOLINSKY: Would it be better for Your Honor,
14 unless it's a very simple straightforward matter, that we use
15 the next hearing date during one of our omnibus hearings to
16 kind of stage it and determine whether a separate trial date
17 should be set?

18 THE COURT: You can use the next hearing date as a
19 status conference to talk about the procedures for teeing them
20 up. But if it's anything major, you're going to have to allow
21 sufficient lead times to get it teed up.

22 MR. SMOLINSKY: Well, we'll work with chambers, Your
23 Honor. But we're going to have to speak well before the
24 hearings in order to make sure that Your court -- the Court has
25 time to address what we need.

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1 THE COURT: Yes, you will, because although my
2 largest cases now have confirmed plans, I am astounded by the
3 continuing litigiousness on claims matters and adversaries that
4 seems to be lingering on in each of them. And at this point,
5 each of GM, Lyondell, BearingPoint, Chemtura, not to mention
6 some of the older blasts from the past, such as Ames and
7 Adelphia, has issues that at least seemingly are not going
8 away.

9 MR. SMOLINSKY: We will do our best to ease your
10 burden, Your Honor.

11 THE COURT: All right.

12 MR. SMOLINSKY: Thank you.

13 THE COURT: Okay. We're adjourned.

14 (Whereupon these proceedings were concluded at 12:02 p.m.)

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2 I N D E X

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4 R U L I N G S

	DESCRIPTION	PAGE	LINE
6	Ruling on discovery issues re adversary	17	17
7	proceeding 11-09400, NCR v. GMC is as		
8	follows:		
9	No need for discovery on underlying		
10	environmental violations but discovery is to		
11	take place re existence of a trust race and		
12	negotiation and drafting of the settlement		
13	documents via attorney depositions which may		
14	then be followed by a motion for summary		
15	judgment		
16	Debtors' objection to Mr. Mealer's 230	53	14
17	million dollar administrative expense claim		
18	under doctrine of respondeat superior		
19	asserting various related causes of action		
20	including defamation of character, trade libel		
21	and interference with Mr. Mealer's prospective		
22	advantage sustained; debtors to settle an order		
23	disallowing the claim		
24			
25			

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1

2 I N D E X, cont'd

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4 R U L I N G S

	DESCRIPTION	PAGE	LINE
6	Debtors' motion seeking authorization to	54	18
7	assume and assign approximately forty-five		
8	contracts to New GM granted		
9	Debtors' 219th omnibus objection to claims	55	1
10	(contingent co-liability claims) sustained		
11	with respect to defaulting parties		
12	Debtors' 220th omnibus objection to claims	55	7
13	sustained with respect to parties who		
14	have not responded		
15	Debtors' objection to claim numbers 67121	55	13
16	and 67122 filed by Superior Industries		
17	sustained; claims will be expunged		
18	pursuant to stipulation reached between		
19	the parties		
20	Debtors' fifteenth omnibus objection to claims	55	19
21	sustained as to the Birdsall claim which was		
22	resolved by stipulation		
23			
24			
25			

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2 C E R T I F I C A T I O N

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4 I, Lisa Bar-Leib, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

6

Lisa Bar-Leib

Digitally signed by Lisa Bar-Leib
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